

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DESTINY S.,

Claimant,

and

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. L 2007010738

DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on March 20, 2007, at Torrance, California.

Dolores Burlison, Director of Children's Services, represented Harbor Regional Center (Service Agency or HRC).

Chanel S., Claimant's adopting parent (Mother), represented Claimant.¹

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge issues the following Decision.

ISSUE

Should Claimant's Adoption Assistance Program (AAP) rating be changed from Service Level 3 to Service Level 4G.

FACTUAL FINDINGS

1. Claimant is a nine year-old girl (date of birth June 4, 1997) who is in the fourth grade. She attends a special education class for severely emotionally disturbed

¹ To protect Claimant's privacy and that of her family members, only the first names and initials of their last name will be used.

children. Claimant is performing at a first grade level. Claimant is a consumer of HRC services by virtue of her diagnosis of mild mental retardation. Mother is actually Claimant's great-aunt. Claimant's biological mother (Mother's niece) used drugs and lost custody of Claimant and Claimant's siblings.

2. Claimant was born with deficits likely due to prenatal drug and alcohol abuse by her biological mother. Claimant and her siblings were treated horribly while in the custody of their biological mother, sometimes having to eat rotten food.

3. As more fully set forth below, Claimant is very aggressive and exhibits severe behaviors. Claimant needs to be monitored at all times as she has significant elopement issues. If left unattended, she will try to leave any location she is in. As she has no concept of personal safety, she will even attempt to exit from a moving vehicle.

4. Mother is in the process of adopting Claimant. Claimant resides with Mother, her Mother's husband, their two daughters, and Claimant's sister.

5. Mother requested that HRC issue an AAP rate letter so as to determine the level of financial support to be received from the County of Los Angeles when the adoption becomes final. HRC agreed to issue an Alternate Residential Model (ARM) rate letter in order to assist in the AAP benefit determination process. HRC initially recommended an ARM Level 2 rate (which equates to \$1,694 per month), and then changed its recommendation to an ARM Level 3 rate (which equates to \$2,006 per month). Mother was dissatisfied with the ARM rate determined by HRC and, on August 27, 2006, filed a Fair Hearing Request.

6. A Fair Hearing was held on November 1, 2006, before Administrative Law Judge Chris Ruiz. In his Decision dated November 16, 2006, Judge Ruiz made the following Finding of Fact:

10. HRC contends that the ARM rates above Level 3 (owner) are only applicable to staff-operated facilities which are not similar to adoptive family situations. Therefore, it is HRC's current policy to not rate any consumer higher than Level 3 (owner). HRC did not consider any level of care above Level 3 (owner) for Claimant. HRC did not determine Claimant's level of care if Claimant were to be placed in a residential facility. HRC stated that, if placed in a residential facility, Claimant may need a Level 4A, or higher, level of care.

Judge Ruiz then reached the following Legal Conclusions:

After having had the opportunity to fully evaluate all of the witnesses and documentary evidence, the ALJ concludes that HRC has not properly assessed Claimant's level of need.

[¶] . . . [¶]

Further, HRC's policy is unfair. For example, consider a minor who presently resides in a residential facility with a Level 4A, or higher, level of care. If adoptive parents then wanted to adopt that child, and bring that child into their home, HRC would presently issue an ARM rate letter indicating that the child's level of care is a Level 3. This rate would not be accurate and would penalize the adoptive parents.

Thereafter, Judge Ruiz issued the following Order:

The Harbor Regional Center shall issue a "rate" letter, within 30 days of the effective date of this decision, to the Los Angeles County of Department of Children and Family Services. That letter will state Claimant's level of care as if Claimant were to be placed in a residential facility. HRC shall not, in this case, continue to rely on its policy that a Level 3 (owner) rate is the highest allowable ARM rate. HRC may state in the letter that the level of care assessed is solely for the purposes of assessing Claimant in order to determine an ARM rate for AAP purposes. If Claimant is dissatisfied with HRC's rate letter, Claimant has the right to request a fair hearing.

7. On December 12, 2006, HRC issued its new ARM rate letter. The letter reads as follows:

This letter clarifies Harbor Regional Center (HRC)'s position with respect to your request for an "ARM" rate to assist you in determining the amount of adoptions assistance to be provided to the adoptive parents of the above-named child.

At this time HRC recommends an ARM rate of Level 3 (currently \$2287.00 per month) for Destiny We have assessed Destiny as needing a level of care that corresponds with a Level 3 home, were she to be placed in a residential facility.

8. Ms. Burlison issued the foregoing rate letter after reviewing HRC's documentation, which included the HRC Individual/Family Service Plan dated June 26, 2006, a psychological assessment, a Long Beach Unified School District (wrongly identified by HRC as the ABC Unified School District) Individualized Education Program (IEP) dated March 22, 2006 and the relevant sections of law dealing with the issuance of ARM letters. Ms. Burlison also conferred with HRC's placement specialist, Mercedes Lowery. Ms. Burlison acknowledged that Destiny does have "behaviors," "deficits," and "delays." However, Ms. Burlison concluded that Destiny did not have "significant behavioral problems" and therefore could be rated no higher than a level 3.

9. Prior to issuing the December 12, 2006 rate letter, Ms. Burlison did not convene a meeting of the Living Options Committee,² nor did she review any of the documents Mother provided at the hearing before Judge Ruiz, documents which Ms. Burlison had in her possession prior to issuing the rate letter. Copies of these same documents were admitted in evidence in this matter. These documents included: a Client Development Evaluation Report (CDER) dated June 23, 2006; a Behavioral Health Services progress report dated September 15, 2006; medication notes; Client Care Plans prepared by Childnet Behavioral Health Services dated June 13, 2006 and June 15, 2005; a Los Angeles County System of Care referral form dated September 26, 2006; a physician's evaluation dated May 25, 2006; a psychological evaluation dated April 1, 2004; IEP's dated September 20, 2004 and October 18, 2005,³ school notes; and, various letters regarding Destiny.

10. Evidence presented at the hearing showed that Destiny does indeed have very significant behavioral problems. She has exhibited extreme behavioral problems such as aggression (assaulting her teachers and peers--in fact one teacher pleaded, in writing, not to allow Destiny back into her class because of assaultive behavior), biting, kicking, scratching, head banging, running around uncontrollably and food throwing.⁴ One of her most significant behavioral issues is elopement. Destiny will run or wander away if left unattended. She has walked out of her class on numerous occasions; she will leave the house if the doors are left unlocked; she will exit a moving vehicle unless restrained. Destiny also suffers from "disturbing nightmares. She talks, screams, and cries in her sleep." She bedwets every night, even though she is toilet trained. Mother is currently seeking a 1:1 aide at school for Destiny. Destiny is never left alone when she is at home.

11. Destiny's most recent psychiatric diagnosis, compiled by a team that included a psychiatrist and two MFT's, was reported on September 15, 2006. Her Axis I diagnoses include: Bipolar Disorder NOS; Post-traumatic Stress Disorder Chronic; Enuresis not due to a medical condition; and, rule out Attention-deficit/Hyper-activity Disorder. Her Axis II diagnosis is Mild Mental Retardation. Perhaps most significantly, Destiny is rated at 40 on the Global Assessment Scale (Axis V). The Children's Global Assessment Scale (CGAS) is a numeric scale (1 through 100) used by mental health clinicians and doctors to rate the general functioning of children under the age of 18. Ratings on a CGAS scale should be independent of specific mental health diagnoses. The scale is presented and described in the DSM-IV-TR. Adults are evaluated on the Global Assessment of Functioning (GAF). A rating of 31-40 on the CGAS is described as follows: "Major impairment in functioning in several areas and unable to function in one of these areas, e.g., disturbed at home, at school, with peers or in society at large, e.g., persistent aggression without clear instigation;

² This is a team of eight to 10 professionals, including a doctor, a psychologist, a nurse, a staff counselor, a program manager, and other HRC staff. In the past, the committee would meet, and each committee member would have input, based on their direct knowledge of the individual being rated, as well as their review of reports, test data, and any other information deemed relevant, in order to determine a client's appropriate level of care.

³ Mom also offered an "open" IEP dated February 22, 2007, after the latest rate letter was issued.

⁴ Because of the food throwing, and her propensity to use eating utensils as weapons, Destiny is not allowed to feed herself.

markedly withdrawn and isolated behavior due to either mood or thought disturbance, suicidal attempts with clear lethal intent: such children are likely to require special schooling and/or hospitalization or withdrawal from school.

CONCLUSIONS OF LAW

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) is a comprehensive statutory scheme designed to provide supports and services for persons with developmental disabilities.⁵ The Act has a two-fold purpose: (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community; and (2) to enable developmentally disabled persons to approximate the pattern of living of nondisabled persons of the same age and to lead more independent and productive lives in the community. (Welf. & Inst. Code, §§ 4501, 4509, 4685, 4750 & 4751; see generally *Association for Retarded Persons v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) The Department of Developmental Services (DDS) is the state agency required to implement the Lanterman Act. It carries out that responsibility by delivering its services through the various regional centers located statewide.

[T]he Legislature has fashioned a system in which both state agencies and private entities have functions. Broadly, DDS, a state agency, “has jurisdiction over the execution of the laws relating to the care, custody, and treatment of developmentally disabled persons” (§4416), while “regional centers,” operated by private nonprofit community agencies under contract with DDS, are charged with providing developmentally disabled persons with “access to the facilities and services best suited to them throughout their lifetime” (§4620). (*Association of Retarded Persons, etc. at p. 389.*)

2. The AAP is a program designed to encourage adoption of children who might otherwise be likely to remain in long-term foster care. The AAP is administered by the Department of Social Services (DSS). The Department of Developmental Services (DDS) bears no responsibility for administering that program.

3. Pursuant to Welfare and Institutions Code section 16118, subdivision (c), either DSS or the county responsible for the person participating in the program determines the amount of AAP benefits payable to the participant’s adopting family. To that end, DSS adopted California Code of Regulations, title 22, section 35333, which states, in pertinent part:

The AAP benefit is a negotiated amount based upon the needs of the child and the circumstances of the adoptive family. The responsible public agency shall negotiate the amount of the AAP benefit and make the final determination of the amount according to the requirements of this section.

⁵ The Lanterman Act is codified at Welfare and Institutions Code section 4500 et seq.

Subdivision (c)(1)(C) of the same regulation addresses the maximum AAP rate for children who are also clients of a regional center, as follows:

If the child is a client of a California Regional Center (CRC) for the Developmentally Disabled, the maximum rate shall be the foster family home rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services

4. Residential facilities in which regional center consumers may be placed are rated by a service level,⁶ as approved by a local regional center. The California Code of Regulations sets the parameters for determining the level of care for consumers placed in the community. “Service level means one of a series of 4 levels which has been approved for each facility by a regional center. Service levels 2, 3 and 4⁷ have a specified set of requirements that a facility must meet which addresses the direct supervision and special services for consumers within that facility.”⁸ “Program Design” is defined as the “description of consumer services offered by a facility, the functional characteristics of the consumers the facility will serve, and the resources available to meet individual service needs consistent with the facility’s service level.”⁹ Facilities approved at Service Level 4 are those caring for the most severely disabled consumers. Service Level 4 is subdivided into Levels 4A through 4I, with increasing staffing and professional consultant requirements that correspond to the escalating severity of the consumers’ disabilities. (Cal. Code Regs., tit. 17, § 56004, subd. (c).)

5. California Code of Regulations, title 17, section 56013 further describes the consumers’ “functional characteristics,” as follows:

[¶] . . . [¶]

(c) . . . the program design for each facility applying for service level 3 approval shall include:

(1) A description of services designed to enhance the capabilities of consumers including those with:

- (A) Significant deficits in self-help skills; and/or
- (B) Some limitations in physical coordination and mobility; and/or
- (C) Disruptive or self-injurious behavior.

⁶ The regulations governing facility service levels are found at California Code of Regulations, title 17, section 56001 et seq.

⁷ Each level then has subdivisions (a) to (i).

⁸ California Code of Regulations, title 17, section 56002, subdivision (a)(44).

⁹ California Code of Regulations, title 17, section 56002, subdivision (a)(30).

(d) . . . the program design for each facility applying for service level 4 approval shall include:

(1) A description of services designed to enhance the capabilities of consumers including those with:

(A) Severe deficits in self-help skills; and/or

(B) Severe impairment in physical coordination and mobility; and/or

(C) Severely disruptive or self-injurious behavior.¹⁰

6. The dispute ranges between a level of care assessment of Level 3 (owner) and Level 4G; the former being HRC's present assessment and the latter being that which Claimant contends is correct. A review of all of the evidence shows that Destiny's "functional characteristics" clearly call for level 4 care. HRC's own guidelines "for determining level of care intensity" are instructive in determining the level, within Level 4, Destiny should be assigned. Level 4G is assigned for children who among other things, "may have behavior challenges that could result in property damages or assaults on others." This description well fits Destiny's behaviors as described above. The "level of care intensity" is a reference to the staffing ratio a facility should have to accommodate the needs of the child in question. A Level 4G facility should offer a "staff-to-client" ratio of one and one-half to two. An argument could be made that Destiny actually would need a staff-to-client ratio of one to one. However, Mother would be satisfied with a Level 4G rating, so consideration is not given to Levels 4H and 4I.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

1. Claimant's appeal of HRC's assessment of Claimant's level of care is granted.

2. HRC shall forthwith issue a new letter to the Department of Children and Family Services, Adoption Assistance Unit, and/or to Claimant's parents, designating Claimant's service level at Level 4G. Said letter shall specifically state that it is issued in replacement of the rate letter HRC issued on December 12, 2006.

Date: _____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

¹⁰ California Code of Regulations, title 17, sections 56013(c) and (d).